RECENT DECISIONS.

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AGENCY—UNDISCLOSED PRINCIPAL—BASIS OF LIABILITY OF AGENT.—The defendant employed another to work for a corporation of which he was managing agent, but failed to disclose the existence of a principal to the person employed, through whose negligence a fire destroyed the plaintiff's property. *Held,* the defendant was liable for the servant's tort. *Cockran* v. *Rice* (S. D. 1910) 128 N. W. 583.

If the real contract in the principal case was between the agent and the servant, then by its terms the agent became the master and was liable for the tort. Otherwise, it is difficult to justify the recovery against the agent. The elements necessary to raise an estoppel in the plaintiff's favor are wholly lacking; nor does it seem that the fiction of identity of principal and agent could be extended to such a case, for it would result in the anomaly of a servant having two distinct masters each liable for the single tort. See *Atwood* v. *Chicago etc. Ry.* (1896) 2 Fed. 447, 454. That an agent of an undisclosed principal is liable on the contract is undisputed, *Davenport* v. *Riley* (S. C. 1882) 5 McCord 198, but as to the theory on which this liability is based there is no such unanimity of opinion. If the agent discloses the existence, but not the identity of a principal, and does not bind himself in terms, the contract seems to be between the third party and the undisclosed principal. See *Scrimshire* v. *Alderton* (1742) 2 Str. 1182. If however the agent in clear and unambiguous terms makes the agreement in his own name, not disclosing the existence of a principal, there is a real contract between the third party and the agent, see *Cothay* v. *Fennell* (1830) 10 B. & C. 671; *Huntington* v. *Knox* (Mass. 1851) 7 Cush. 371, if the expressions of the parties are to govern in determining their intent; and no reason is seen for departing from this accepted rule of construction in this case. This explanation is reinforced by the view of the early law, which apparently regarded the third party and the agent as the parties to the transaction, holding the undisclosed principal only in case he received the benefit. Y. B. 34 & 35 Edw. I (1307) 567; Doctor and Student (1518) Dia. II ch. 42; Huffcut, Agency 162. On this theory the result reached in the principal case is justifiable.

BANKS AND BANKING—RELATION OF DEBTOR AND CREDITOR—CANCELLATION OF CREDIT.—The plaintiff's factor, instead of forwarding the proceeds of the sale of goods to the defendant bank as directed, sent the money to an intermediate bank to the credit of the defendant. The latter upon notice of the transaction credited the plaintiff. *Held,* the credit was provisional only and could be cancelled, when, before collection, the intermediate bank became insolvent. *Bank of Big Cabin* v. *English* (Okla. 1910) 111 Pac. 388. See Notes, p. 163.

CARRIERS—CONTRACT OF CARRIAGE—AUTHORITY OF TICKET AGENT.—A ticket agent of a railroad company sold tickets to the plaintiff and without express authority to do so guaranteed connections with a certain train at an intermediate point. *Held,* the instruction of the

lower court to find for the plaintiff if the guaranty had been proved was correct. *Hayes* v. *Wabash R. R. Co.* (Mich. 1910) 128 N. W. 217.

Every agency carries with it the necessary implication that the agent has authority to do whatever is necessary or usual in affecting the object of his agency, and any undisclosed limitation on such implied authority does not, in absence of notice, affect the third person. *Butler* v. *Maples* (1869) 9 Wall. 766. Where there is neither express authority to make a particular contract, nor false representation by the principal upon which to base an estoppel, it is incumbent on the third person to prove that the agent's authority was necessary or usual, and the determination of the question is for the jury. *Herring* v. *Skaggs* (1878) 62 Ala. 180. The authority of a carrier's agent for the transportation of goods seems originally to have been such a question, *Deming* v. *Grand Trunk R. R. Co.* (1869) 48 N. H. 455, but according to the later cases, its determination is apparently dependent upon judicial recognition of usage and necessity. *Wood* v. *Chi. M. & St. P. Ry. Co.* (1886) 68 Ia. 491; *Rudell* v. *Transit Co.* (1898) 117 Mich. 568. Although the same position has been taken with respect to the authority of a general passenger agent, *Foster* v. *Cleveland etc. Ry. Co.* (1893) 56 Fed. 434, the position of the principal case, disposing of a case involving the authority of a mere ticket agent to bind the carrier by guaranty, is questionable in the absence of a customary usage to that effect.

CONFLICT OF LAWS—CONTRACTUAL CAPACITY—WHAT LAW GOVERNS.—A contract was made in France, performable in New York, where both parties were domiciled. In an action brought in New York the defendant, a married woman, claimed that under the law of France, which in this case should govern, the contract was void because of her incapacity. *Held,* the contract was valid, the defendant having capacity according to the law of her domicile and the law of the place of performance. *Hammerstein* v. *Sylva* (1910) 124 N. Y. Supp. 537. See Notes, p. 157.

CONFLICT OF LAWS—CORPORATIONS—STOCKHOLDERS' LIABILITY.—A corporation was organized under the laws of Arizona, to transact part of its business in Arizona and part in California. The plaintiff brought suit in California to enforce the statutory liability of a stockholder for corporation debts according to the laws of California. *Held,* the defendant was liable. *Thomas* v. *Wentworth Hotel Co.* (Cal. 1910) 110 Pac. 942.

For a discussion of the principles involved in this case, see 10 COLUMBIA LAW REVIEW 520 *et seq.,* particularly at 540, agreeing with the conclusion reached in the principal case.

CONSTITUTIONAL LAW—LOCAL SELF-GOVERNMENT—ASSESSMENT OF TAXES.—A statute provided that the state tax commissioners, when it appeared to them that an assessment in any district was not made in substantial compliance with the law, should appoint persons to reassess. The defendant, a town clerk, refused to act under the order of such appointees on the ground that the law conflicted with a provision of the state constitution that town officers should be elected by the town or appointed by the authorities thereof. *Held,* one judge dissenting, the statute was constitutional. *State ex rel. Hessey* v. *Daniels* (Wis. 1910) 128 N. W. 565.

The constitutional provision considered in the principal case was copied from the New York constitution and has received a corresponding interpretation. *State* v. *Anson* (1907) 132 Wis. 461, 464. Its purpose is to guarantee self-government to local bodies as it existed at the time of its adoption. *People* v. *Albertson* (1873) 55 N. Y. 50; *Rathbone* v. *Wirth* (1896) 150 N. Y. 459. Its provisions, therefore, are not to be evaded by changing the name of the office or the mode of performing its duties; *People* v. *Albertson supra;* for, while the office may be destroyed by legislative act, its functions must continue to be exercised locally, as at the time of the constitutional provision, if at all. *Davies* v. *Supervisors* (1891) 89 Mich. 295; see *People* v. *Tax Commissioners* (1903) 174 N. Y. 417, 434. Tax assessors in New York have always been locally elected or appointed, 3 COLUMBIA LAW REVIEW 267, and are regarded as local officers. *People* v. *Raymond* (1868) 37 N. Y. 428. The same seems to be true in Wisconsin. Wis. R. S. (1849) ch. 15 § 54; see R. S. (1898) ch. 49 §1150. If the state may resume functions exercised by local officers, but not distinctly local in character, *Newport* v. *Horton* (1900) 22 R. I. 196, it is arguable that a provision for the assessment of state taxes by state officers would, as such a function, see *People* v. *Hurlbut* (1871) 24 Mich. 44, 81, 103; Cooley, Taxation (3rd Ed.) 1294, be proper despite the constitutional provision. But see *contra People* v. *Tax Commissioners supra.* No such distinction, however, was attempted in the principal case, which therefore would seem to violate the constitutional safeguard.

CONTRACTS—ACCEPTANCE—LIMITATION OF LIABILITY.—The defendant, a carrier, delivered to the plaintiff's agent an express receipt containing a usual provision of limited liability, of which both the agent and principal were unaware. *Held,* a presumption of assent to the special limitation arose from the acceptance of the document, but it was rebutted by proof of ignorance of such limitation, and the plaintiff was not bound thereby. *Hill, To Use of Ferris* v. *Adams Express Co.* (N. J. 1910) 77 Atl. 1073.

By the mere acceptance from a carrier of a document such as a ticket, express receipt, bill of landing, etc., with knowledge of its contractual nature, the taker is bound, on the principle that he accepts the terms whatever they may be. *Bascom* v. *Smith* (1895) 164 Mass. 61; *Fonseca* v. *Cunard Steamship Co.* (1891) 153 Mass. 533. Again, where constant usage and familiarity in the locality have stamped upon the particular document a contractual character, the taker is not excused because unaware that what he accepted was a contract. His taking such a document without objection is a representation that he knows and assents to its terms. *Harris* v. *Great Western Ry. Co.* (1876) L. R. 1 Q. B. D. 515, 530-534; *Watkins* v. *Rymill* (1883) L. R. 10 Q. B. D. 178. If the carrier then renders services which, as is usually the case, would not have been rendered unless in reliance on the special contract, an estoppel would seem to be created. See *Preston* v. *Mann* (1856) 25 Conn. 118, 128; *Manufacturers' and Traders' Bank* v. *Hazard* (1864) 30 N. Y. 226, 230. In the few cases where the shipper or passenger because of ignorance, or physical or mental defects, is patently incapable of making such a representation, there would seem to be no theory upon which he could be held bound. In the principal case, assuming that the plaintiff did not know of the contractual nature of the receipt as a whole, the case would have been more properly decided, it would seem, by application of the estoppel theory.

CONTRACTS—GUARANTY—NOTICE OF ACCEPTANCE.—The defendant had promised, at the plaintiff's request, to guaranty payment of sales to a third party. The plaintiff acted under this promise and never notified the defendant. *Held,* as the request and promise to guaranty formed a complete contract, notice was unnecessary. *J. L. Mott Iron Works* v. *Clark* (S. C. 1910) 69 S. E. 227.

It is often held in this country that where a guaranty is absolute notice is unnecessary, *Wilcox* v. *Draper* (1881) 12 Neb. 138, whereas if it is but a conditional offer such notice must be given in order to complete the contract. *Wilkins* v. *Carter Bros. & Co.* (1892) 84 Tex. 438. Aside from the practical impossibility of applying such a distinction, this position is unsound on principle. Bare notice of intention to act under the guaranty, or, as in the principal case, a previous request, could seldom be construed as a promise binding on the guarantee. There is then no consideration moving from the guarantee, and hence no contract. *Offord* v. *Davies* (1862) 12 C. B. [N. S.] 748. Therefore in the absence of a counter-promise or other consideration, the guaranty is but an offer, becoming a contract only when accepted by extending credit, that act also furnishing consideration. *Offord* v. *Davies supra; Bishop* v. *Eaton* (1894) 161 Mass. 496. Thus notice properly plays no part in forming the contract, but is requisite for other reasons. It is sometimes said that notice of acceptance is essential when, and because, the promisor is ignorant of his liability, *Babcock* v. *Bryant* (Mass. 1831) 12 Pick. 133; *cf. Milroy* v. *Quin* (1879) 69 Ind. 406, and the broad principle is laid down that where the act of acceptance is peculiarly within the promisee's knowledge, notice thereof must be given to the promisor within a reasonable time thereafter. *Craft* v. *Isham* (1838) 13 Conn. 28; *Bishop* v. *Eaton supra.* The sound view seems to be that in such a case a condition of giving notice is implied in law as prerequisite to recovery, *Tuckerman* v. *French* (Me. 1830) 7 Greenl. 115, because without it the guarantor may be injured through his ignorance. *Babcock* v. *Bryant supra.* Therefore in the principal case the inquiry should have been whether the defendant had reasonable means of knowing of the plaintiff's extension of credit. If not, the action should have failed.

CORPORATIONS—DEFECTIVE INCORPORATION—LIABILITY OF STOCKHOLDERS.—Although the defendants had made no attempt to incorporate under the existing general law, they actually exercised corporate powers in good faith, relying upon a former colorable attempt to form a corporation under a prior act. *Held,* a third party who had contracted with the association as an entity could not maintain an action against the stockholders as partners. *Jennings* v. *Dark* (Ind. 1910) 92 N. E. 778. See Notes, p. 160.

DAMAGES—LIQUIDATED DAMAGES—APPORTIONMENT OF DELAY.—The plaintiff agreed to construct a vault for the defendant by a certain day or to pay liquidated damages for each day's delay. The completion of the work was delayed by the mutual fault of the parties. *Held,* the stipulation for liquidated damages was abrogated and there could be no apportionment of damages for the delay. *Mosler Safe Co.* v. *Maiden Lane Safe Deposit Co.* (N. Y. 1910) 93 N. E. 81.

That the enforcement of a stipulation for liquidated damages under such circumstances will be practically difficult because it necessitates determining the extent of the delay caused by each party, *Jefferson*

Hotel Co. v. *Brumbaugh* (1909) 168 Fed. 867, seems no valid reason for refusing to give it effect, if this were the intention of its makers. *Cf. Caldwell* v. *Schmulbach* (1909) 175 Fed. 429. Nor is it of consequence that hardship will result, unless the contract is ambiguous. See *Dodd* v. *Churton* L. R. [1897] 1 Q. B. 562. The practical difficulty has often been overcome, *Wallis* v. *Wenham* (1910) 204 Mass. 83; *Morse Repair Co.* v. *Seaboard Transp. Co.* (1908) 161 Fed. 99, and conflicting decisions in the same jurisdiction, inexplicable in the absence of different intentions, result from a too rigid application of a rule of construction. It may nevertheless be fairly assumed that the parties intend to abrogate a time limit whenever the owner causes delay, see *Tex. & St. L. Ry. Co.* v. *Rust* (1883) 19 Fed. 239; *McGowan* v. *Amer. Tan Bark Co.* (1887) 121 U. S. 558, 600, and to allow the contractor not merely additional time equal to such delay, *Graveson* v. *Tobey* (1874) 75 Ill. 540, but such as is reasonable under all the circumstances. *Green* v. *Haines* (N. Y. 1856) 1 Hilt. 254. The added assumption, that for further delay the builder is to be liable only for the actual damages suffered by the owner, seems equally justifiable. *Torpedo Boat Co.* v. *Nixon* (N. Y. 1908) 61 Misc. 469. It is hard to conceive that a builder would assume so harsh an obligation without the ability to forecast definitely the moment of its inception and the conditions of his work, *Willis* v. *Webster* (N. Y. 1906) 1 App. Div. 301, and a change in these by the owner should absolve him from his former liability. Any other rule would therefore enforce a contract never made, *Holme* v. *Guppy* (1838) 3 M. & W. 386, and the conclusion of the principal case is accordingly sound. 3 Halsbury, Laws of England 243.

DEEDS—RESERVATION—"MINES AND MINERALS."—A deed of 1814 by one Wickham excepted "mines and minerals." The defendant, contending that limestone covering the surface, and deep-lying gypsum occasionally cropping out, passed by this deed, claimed title to the latter by purchase from an owner of the land. *Held,* the limestone passed, but the gypsum did not, and the plaintiff's title to the latter, derived from Wickham's heirs, was valid. *White* v. *Miller* (N. Y. 1910) 92 N. E. 1065.

The term "minerals" is applied in its legal sense to all substances of a mineral nature having a value of their own, independent of their being a part of the soil; *Armstrong* v. *Granite Co.* (1895) 147 N. Y. 495, 503; *Hendler* v. *Lehigh Valley Ry. Co.* (1904) 209 Pa. 256; *Fishbourne* v. *Hamilton* (1890) 25 L. R. Ir. 483; and there would seem to be no reason why, when coupled with "mines," its application should be arbitrarily restricted to products of mines. *Fishbourne* v. *Hamilton supra; contra, Brady* v. *Smith* (1905) 181 N. Y. 178. Such is the English rule; which, however, forbids the winning of the severed minerals by a destruction of the surface, in the absence of assurance of compensation to the owner of the latter. *Fishbourne* v. *Hamilton supra;* see *contra, Robertson* v. *Coal Co.* (1896) 172 Pa. 566, 571-2. But since the scope of the phrase "mines and minerals" ultimately depends upon the intention of the parties, *Armstrong* v. *Granite Co. supra,* it would seem preferable to say, where the obtaining of a certain mineral would cause serious destruction of the surface, that such mineral, in the absence of a clear indication of a contrary intent, was presumably not severed from the surface estate by the grant or reservation. See *Armstrong* v. *Granite Co. supra.* And conversely, since in

the principal case the gypsum, unlike limestone, could apparently be obtained without serious destruction of the surface, the result—that gypsum was embraced in the reservation—seems to be correct. *Brady* v. *Smith supra,* however, which the court professes to follow, restricts "minerals" coupled with "mines" to its narrower meaning; and since gypsum was not shown ever to have been mined at the date of the deed, according to this authority the decision in the principal case is perhaps doubtful.

DESCENT AND DISTRIBUTION—DISQUALIFICATION OF HEIR—MURDER OF ANCESTOR.—A widow, convicted of murder in the second degree for killing her husband, sought to obtain her statutory inheritance in his property. *Held,* in the absence of express prohibition the statutory heir may inherit. *In re Gollnik's Estate* (Minn. 1910) 128 N. W. 292.

By some decisions, an heir or devisee who murders his ancestor or testator in order to secure his property forfeits his right to take legal title to his share in the decedent's estate. *Riggs* v. *Palmer* (1889) 115 N. Y. 506; *Perry* v. *Strawbridge* (1908) 209 Mo. 621. Such a rule, despite the strong reasons of justice in its favor, would seem improper in view of the positive language of statutes governing the devolution or devise of a decedent's property, *Carpenter's Estate* (1895) 170 Pa. St. 203, for there can be no public policy in contravention of the express terms of a statute. *Shellenberger* v. *Ransom* (1894) 41 Neb. 631; Wharton, Homicide § 667. By the better and accepted view, the title passes to the heir or devisee upon the decedent's death regardless of its cause. *Shellenberger* v. *Ransom supra; Ellerson* v. *Wescott* (1895) 148 N. Y. 149. However, on the principle that no man may take advantage of his own wrong, *Doe* v. *Bancks* (1821) 4 B. & Ad. 401, 409, courts of equity have held that the murderer of a testator shall hold the property devised or bequeathed as trustee *ex maleficio* for the representative of his victim. *Ellerson* v. *Wescott supra; Cleaver* v. *Mut. Res. Ass'n* L. R. [1892] 1 Q. B. D. 147. The attempted distinction between heirs and beneficiaries in such cases seems unfounded. Though in intestacy the title vests by operation of law, yet the law operates by reason of the crime, and it is submitted that in justice, equity should equally impose a trust upon the heir. Such a result apparently does not violate the terms of the statute, and seems more desirable than the prevailing view that the title passes absolutely, free from any equities. *Deem* v. *Millikin* (1892) 6 Oh. Cir. Ct. 357; *Shellenberger* v. *Ransom supra.* The principal case is sought to be distinguished on the ground that the murder, being in the second degree, was not committed for the purpose of acquiring the estate of the deceased. The verdict in the criminal case, however, should not be conclusive in the probate proceedings, 11 COLUMBIA LAW REVIEW 170, and it was therefore competent for the court to inquire into the true motive for the crime. *Riggs* v. *Palmer supra.* The decision, however, is strictly in accord with authority.

EVIDENCE—CONFESSIONS—BURDEN OF PROVING ADMISSIBILITY.—The defendants were indicted for larceny and objected to the admission in evidence of a confession made by them, as having been extorted by fear. The evidence on this point was conflicting. *Held, prima facie* the confession was admissible, and the burden was on the defendant of proving its inadmissibility. *Berry* v. *State* (Okla. 1910) 111 Pac. 676.

This is contrary to the weight of authority, which holds that the

prosecution, in seeking to put in evidence a confession, must show affirmatively that it was made under proper circumstances. *Reg.* v. *Warringham* (1851) 2 Den. Cr. C. 445; *Hopt* v. *Utah* (1884) 110 U. S. 574, 587. The question of the admissibility of a confession is one for the court, *U. S.* v. *Stone* (1881) 8 Fed. 232, 256, which must be satisfied, though not beyond a reasonable doubt, that the confession is admissible. *Cf. Comw.* v. *Robinson* (1888) 146 Mass. 571, 581. In early times any confession was admitted. Wigmore, Evidence § 818. When however it was seen that confessions induced by torture or like means were so apt to be false as to be wholly unreliable, a strong reaction took place, and only confessions made under circumstances which could cast no doubt upon their reliability were admitted, *Reg.* v. *Baldry* (1852) 2 Den.Cr. C. 428, any confession made under doubtful circumstances being excluded. *Reg.* v. *Garner* (1848) 1 Den. Cr. C. 329. This practice furnishes a possible historical explanation for the general rule, which on principle as well would seem to be the better one. But see Wigmore, Evidence § 860. There is apparently no logical reason for any presumption, either that the confession was induced by threats or promises, or to the contrary. The rule then rests on the doctrine, shown in analogous cases, that he who seeks to introduce evidence must satisfy the court that it is admissible, even where the question is one of fact; for example, in the case of the admissibility of a dying declaration, see *Comw.* v. *Haney* (1879) 127 Mass. 455, or of evidence of former crimes as part of a single scheme. *Comw.* v. *Robinson supra.* The principal case therefore seems unsound.

EVIDENCE—INSANITY—OPINION OF NON-EXPERT.—A witness, having given evidence of his acquaintance with the testatrix and testified to certain of her acts indicating an unsound state of mind, was asked his opinion as to her sanity. *Held,* this was a sufficient foundation for the opinion of the witness. *Grill* v. *O'Dell* (Md. 1910) 77 Atl. 984.

Though opinion evidence of a non-expert as to insanity is almost everywhere admitted, there is considerable conflict of authority as to the necessary pre-requisites to its admission. A number of jurisdictions have adopted the rule that a witness must first state the facts on which his opinion is based, *Choice* v. *State* (1860) 31 Ga. 424, and the New York courts have strictly limited the expression of opinion to a characterization of the facts stated. *People* v. *Truck* (1902) 170 N. Y. 203. However, as the reason for admitting evidence in such cases is the practical impossibility of describing all the acts which gave rise to the opinion, *Clary* v. *Clary* (N. C. 1841) 2 Ired. L. 78, it is obvious that such a rule cannot be strictly applied without excluding the very cases that necessitated the exception; and so in most jurisdictions the rule has been more accurately stated as requiring of the witness only a statement of facts sufficient to base his opinion upon. *Brashears* v. *Orme* (1901) 93 Md. 442. Even in this modified form the rule seems questionable, as it tests mainly the ability of the witness to state specific facts from which the jury may draw its own conclusion; *Brown* v. *Comw.* (Ky. 1878) 14 Bush 398; and although such facts may greatly affect the weight of the opinion, *Brooke* v. *Townshend* (Md. 1848) 7 Gill 10, they should not be made a condition to its admission. See *Wood* v. *State* (1881) 58 Miss. 741; *State* v. *Lewis* (1889) 20 Nev. 345. The only reasonable requirement would therefore seem to be a sufficient acquaintance with the alleged insane

person to enable the witness to form an opinion and not a mere guess. *Wise* v. *Foote* (1883) 81 Ky. 12. The principal case, though bound by authority to the former rule, is interesting as showing a tendency to give greater weight to the latter limitation and to treat evidence of acts merely as a formal requirement.

EVIDENCE—NEGATIVE TESTIMONY—SOUNDS.—A passenger on one of the defendant's street cars was injured by a collision with a wagon at a crossing and sued to recover for the defendant's negligence. Occupants of the wagon testified that they did not hear the bell. *Held,* this was some evidence that the bell was not sounded. *Doherty* v. *Boston & N. St. Ry. Co.* (Mass. 1910) 92 N. E. 1026.

Pure negative testimony as to sounds, at least when the witness was in a situation where he might well hear, if uncontradicted raises a *prima facie* case, and may have strong probative value where, if the act had occurred, it must have been observed by some one and yet no positive witnesses are produced; *Haverstick* v. *Penn. R. R. Co.* (1895) 171 Pa. St. 101; although where the likelihood that the witness would have heard the sound is slight, as by reason of inattention, or absorbing occupation, *Hubbard* v. *B. & A. R. R. Co.* (1893) 159 Mass. 320, the court need not submit the case to the jury. When met by affirmative evidence, the probative value of such testimony is lost; for its truth is quite consistent with the facts affirmatively testified to, and there is therefore no conflict of evidence. *B. & O. R. R. Co.* v. *Roming* (1902) 96 Md. 67; *Horn* v. *B. & O. R. R. Co.* (1893) 54 Fed. 301; *Tocker* v. *Ayer* (1821) 3 Phil. 539. Where, however, the witness was paying particular attention, *McDonald* v. *N. Y. Cent. R. R. Co.* (1904) 186 Mass. 474, or from his situation must have observed the event if it occurred, *Hendricken* v. *Meadows* (1891) 154 Mass. 599, his testimony is no longer regarded as purely negative, and hence, even if opposed by positive testimony, justifies the submission of the case to the jury. *Quigley* v. *D. & H. Canal Co.* (1891) 142 Pa. St. 388; *Dyer* v. *Erie Ry.* (1877) 71 N. Y. 228, 237; but see *Culhane* v. *N. Y. Cent. R. R. Co.* (N. Y. 1876) 67 Barb. 562. Persons approaching a railroad crossing are usually held to be in such a situation. *Slattery* v. *N. Y. N. H. & H. R. R. Co.* (1909) 203 Mass. 453; *North. Cent. Ry. Co.* v. *Gilmore* (1905) 100 Md. 404. In the principal case, therefore, whether or not the negative testimony offered was met by positive testimony to the contrary, the situation of the persons furnishing it gave it sufficient probative value to raise a question for the jury.

EVIDENCE—TELEPHONE CONVERSATION—IDENTITY OF PARTY.—In a contract action the trial court admitted testimony of the plaintiff's agent that he had made the agreement over the telephone with one claiming to be the defendant; that he had never heard the defendant's voice on any other occasion until the trial, two months later, when he recognized it as the one he had heard over the telephone. *Held,* the evidence should have been excluded. *James L. Wells Co.* v. *Silverman* (1910) 125 N. Y. Supp. 457.

While the presumption that one answering a telephone from a place of business is the person called, or one authorized to speak for him, is sufficient to admit the conversation where the identity of a particular individual need not be established, yet where proof of such identity is essential, further evidence thereof than the word of the person answering must be adduced to render the conversation ad-

missible. 8 COLUMBIA LAW REVIEW 587; *contra, Globe Co.* v. *Stahl* (1886) 23 Mo. App. 258. This evidence may be either recognition of a familiar voice at the time of speaking, *Stepp* v. *State* (1892) 31 Tex. Cr. 349, or facts subsequent to the conversation. *People* v. *McKane* (1894) 143 N. Y. 455, 474. While subsequent recognition of a voice first heard in the dark has been held sufficiently certain to identify the speaker, *State* v. *Herbert* (1901) 63 Kan. 516, this mode of identification has never been extended to telephone conversations; but see *William Deering & Co.* v. *Shumpik* (1897) 67 Minn. 348; and in view of the uncertainty which, as a matter of common experience, attaches to the recognition of even a familiar voice when heard over the telephone, such an extension, at least in the absence of some marked peculiarity in the speaker's voice, *cf. Wilbur* v. *Hubbard* (N. Y. 1861) 35 Barb. 303, would seem undesirable. The holding of the principal case is therefore correct.

INTERSTATE COMMERCE—SHERMAN ANTI-TRUST ACT—STATUTE OF LIMITATIONS.—The defendants, to an indictment alleging that the defendants "on December 30, 1903, and from that day until the day of presenting the indictment (July 1, 1909), have engaged in an unlawful conspiracy in restraint of trade," pleaded the Statute of Limitations, averring that for more than three years before the finding of the indictment they did not act in aid of such conspiracy. *Held,* as a conspiracy may have continuance in time, the allegation of the indictment must be denied under the general issue and not by a special plea. *U. S.* v. *Kissel* (1910) 31 Sup. Ct. Rep. 124.

For a discussion of this case in the Circuit Court, advancing the principles relied on by the Supreme Court in reversing the court below, see 9 COLUMBIA LAW REVIEW 734. See also 10 COLUMBIA LAW REVIEW 159.

JUDGMENTS—RES ADJUDICATA—CRIMINAL JUDGMENTS IN CIVIL ACTIONS FOR PENALTIES.—In a mandamus proceeding to compel the payment of a rebate upon a surrendered liquor tax certificate conditioned upon non-violation of the law, the defense was that the relator's assignor had violated the statute. The relator contended that the acquittal of his assignor's bar-tender who was indicted for the same, operated as *res adjudicata. Held,* it did not. *People ex rel.* v. *Clement, Commissioner* (1910) 124 N. Y. Supp. 748. See Notes, p. 170.

LIBEL—QUALIFIED PRIVILEGE—EFFECT OF SUBSEQUENT PUBLICATION.—A complaint in libel stated that a violent letter, calling attention to alleged unlawful acts of the plaintiff, a police commissioner, was sent by the defendant to the mayor and the newspapers. To the defendant's answer, setting up a qualified privilege as to the communication to the mayor, the plaintiff demurred. *Held,* neither the publication in the public press nor the intemperate language used could, as a matter of law, deprive the occasion of its privilege. *Bingham* v. *Gaynor* (1910) 125 N. Y. Supp. 216.

A qualified privilege attaches to a communication addressed by a member of the public to a public officer complaining of the official conduct of an inferior officer. *Tyree* v. *Harrison* (1902) 100 Va. 540. The burden of proving malice in case of a privileged communication is upon the plaintiff, *Coloney* v. *Farrow* (N. Y. 1896) 5 App. Div. 607, the question being for the jury. *Klink* v. *Colby* (1871) 46 N. Y. 427.

A further publication of the libelous matter complained of may be evidence of malice, *Clark* v. *Brown* (1875) 116 Mass. 504, as may also an intemperate expression in the publication in question. *Farley* v. *Thalhimer* (1905) 103 Va. 504. But the fact that the words made the basis of the action were afterwards published in a newspaper is not of itself conclusive evidence of malice, *Laughton* v. *Bishop of Soder* (1872) L. R. 4 P. C. 495, and unless malice in fact is found the privilege is not lost. *Denver P. W. Co.* v. *Hallaway* (1905) 34 Colo. 432. While, therefore, subsequent publication in the newspapers alleged in the principal case might itself constitute an actionable libel, as not being under the cloak of privilege attaching to the communication to the mayor, neither it nor the intemperate language used could, as a matter of law, destroy the qualified privilege attaching to the original publication.

MALICIOUS PROSECUTION—DISCHARGE UPON EXAMINATION AFTER ARREST WITHOUT WARRANT.—The plaintiff was arrested by an officer without a warrant at the instigation of the defendant who accused him of larceny. After examination before a magistrate he was discharged. *Held,* the proceedings were sufficient to base an action of malicious prosecution. *MacDonald* v. *Nat. Art. Co.* (1910) 125 N. Y. Supp. 708.

The action for malicious prosecution is the proper remedy for wrongfully putting in force legal process, *Cooper* v. *Armour* (1890) 42 Fed. 215, and is identical with that for malicious arrest, both being actions on the case, *Brown* v. *Chadsey* (N. Y. 1863) 39 Barb. 253; *Morgan* v. *Hughes* (1788) 2 T. R. 225, as distinguished from false imprisonment, which is the proper remedy where the proceedings are illegal. *Bixbee* v. *Brundage* (Mass. 1854) 2 Gray 129; *Lewin* v. *Uzuber* (1886) 65 Md. 341. What is a sufficient prosecution to found the action has been variously decided, the courts differing as to the sufficiency of the mere filing of a complaint. *Newfield* v. *Copperman* (N. Y. 1873) 15 Abb. Pr. [N. S.] 360; *Holmes* v. *Johnson* (N. C. 1852) 1 Busbee 44. There is apparent unanimity however as to the sufficiency of arrest, *O'Driscoll* v. *M'Burney* (S. C. 1819) 2 Nott & McC. 54; *Page* v. *Citizen's Banking Co.* (1900) 111 Ga. 73; *Leever* v. *Hammill* (1877) 57 Ind. 423, and the intimation of the principal case requiring in addition a "judicial proceeding," was not necessary to the determination of the case, and unsupported but for a *dictum*. *Barry* v. *Third Ave. R. R.* (N. Y. 1900) 51 App. Div. 385. The plaintiff's arrest being legal, N. Y. Cr. Code § 177, malicious and without probable cause, no further elements were necessary for the result properly reached.

MARRIAGE—ANNULMENT FOR INCAPACITY—NATURE OF LIMITATION ON ACTION.—Ten years after solemnization of a marriage an action for annulment on the ground of physical incapacity was brought under § 1752 of the New York Code, which provides that such actions must be brought within five years. The Statute of Limitations was not pleaded by the defendant. *Held,* the plaintiff was entitled to relief. *McNair* v. *McNair* (1910) 125 N. Y. Supp. 1.

Courts of common law and Chancery never possessed jurisdiction to declare a marriage void, but such jurisdiction was confined to the ecclesiastical courts. *Peugnet* v. *Phelps* (N. Y. 1867) 48 Barb. 566. The ecclesiastical law was never adopted in New York, and any jurisdiction in this regard which the Supreme Court possesses has been

conferred by statute; *Burtis* v. *Burtis* (N. Y. 1825) Hopk. 557; *cf.* *Griffin* v. *Griffin* (1872) 47 N. Y. 134, 139; hence § 1752 of the Code clearly confers a right not previously existing at common law. On the principle that statutes in derogation of the common law must be strictly construed, where a statute gives a right and at the same time limits the period in which it can be exercised, it is held that the right itself is restricted and not the remedy. *The Harrisburg* (1886) 119 U. S. 199, 214. Though this is undoubtedly a rule of construction merely, where the legislature has failed to make the statutory period clearly a limitation of the remedy, no such interpretation should be given to it. *Stern* v. *La Campagnie Generale Transatlantique* (1901) 110 Fed. 996. Since time is of the essence of the right the plaintiff should aver that his action is brought within such time, see *Cook* v. *Chambers, Adm'r* (1886) 107 Ind. 67, and hence the defendant is not required to set up the limitation as in the ordinary case where it affects only the remedy. *Newcomb* v. *Steamboat "Clermont"* (Ia. 1851) 3 Greene 285. Such apparently was the interpretation put upon § 47 of the Domestic Relations Law, 3 R. S. (6th Ed.) 154, which § 1752 of the Code replaced. *Griffin* v. *Griffin* (N. Y. 1861) 23 How. 183; see *Kaiser* v. *Kaiser* (N. Y. 1879) 16 Hun 602 (dissenting opinion). In holding that the limitation goes merely to the remedy unless a contrary intent clearly appears, the court in the principal case has adopted a rule of construction which is opposed to the weight of authority and seems unsound on principle.

NEGLIGENCE—GROSS AND ORDINARY NEGLIGENCE—INCONSISTENCY OF SPECIAL FINDINGS.—In an action for personal injury the complaint alleged ordinary negligence, and the jury specially found both "ordinary" and "gross" negligence. There was evidence to sustain either finding. *Held,* the special findings being inconsistent, the verdict could not stand. *Haverland* v. *Chi., St. P. M. & O. R. Co.* (Wis. 1910) 128 N. W. 273.

The decision proceeds on the theory that "gross" negligence differs in essence from other negligence. According to the decisions of Wisconsin and other states, "gross" negligence involves constructive intent, *Rideout* v. *Winnebago Co.* (1904) 123 Wis. 297, being the same thing as wilful recklessness, *Aiken* v. *Holyoke St. R. Co.* (1903) 184 Mass. 269, and is therefore equivalent to intentional injury. *Rideout* v. *Winnebago Co. supra.* If such equivalence actually exists, the holding of the principal case would seem to be sound. But the presence of constructive intent, a creature of the criminal law, is quite consistent with a negative state of mind as to doing injury, inasmuch as it excludes the notion of intention in fact. In this respect an act caused by such negligence as would give rise to the presumption of criminal intent differs from an act done wilfully in the sense of purposely. Its difference from an act of ordinary negligence, therefore, lies solely in the degree of recklessness; and if gross negligence differs in degree alone from ordinary negligence, it is not inconsistent therewith, *Penna. Co.* v. *Krick* (1874) 47 Ind. 368; *Turnpike Co.* v. *Maupin* (1880) 79 Ky. 101, but includes the latter as the greater includes the less. Proof of such negligence as this, therefore, amply supports allegations of ordinary negligence. Abbott, Trial Evidence (2nd Ed.) 719; *L. & N. R. Co.* v. *Mitchell* (1888) 87 Ky. 327. It follows that in the principal case there was no inconsistency, and as the questions of exemplary damages and contributory negligence appear not to have

been raised, the defendant's rights could not have been prejudiced by disregarding the finding of gross negligence and upholding the general verdict. The court, however, naturally followed the precedents of its own jurisdiction. See *Rideout* v. *Winnebago Co. supra.*

NEGLIGENCE—LICENSEES—DUTY OF LICENSORS.—The plaintiff, while visiting his father, an employee of the defendant, was injured by a negligent act of the defendant's servant, who knew of his presence. *Held,* two judges dissenting, the defendant was bound only to refrain from intentionally or wantonly injuring the plaintiff, whether he was a trespasser or a bare licensee. *Roche* v. *American Ice Co.* (1910) 125 N. Y. Supp. 323.

The doctrine of the principal case, which is frequently asserted, Cooley, Torts 1268; *Ill. Cent. R. R. Co.* v. *Eicher* (1903) 202 Ill. 556, is inaccurate in its breadth. Although licensees, whatever the nature of their permissive right, as well as trespassers, must take the premises as they are, *Hounsell* v. *Smyth* (1860) 7 C. B. [N. S.] 729, assuming the risks of existing conditions, *Reardon* v. *Thompson* (1889) 149 Mass. 267; *Means* v. *So. Cal. Ry. Co.* (1904) 144 Cal. 473, their positions thenceforth become essentially unlike, for a trespasser may never claim more than freedom from wilful or reckless injury. *Magar* v. *Hammond* (1906) 183 N. Y. 387. On the other hand, where a license is implied from acquiescence in the customary use of his premises, a licensor is accountable for affirmative negligence which increases dangers existing at the time of the origin of the license and injures the licensee. *Gallagher* v. *Humphrey* (1862) 6 L. T. [N. S.] 684. The licensor's liability is often attributed to the probability of injury from his act, *Lepnick* v. *Gaddis* (1894) 72 Miss. 200, or the sense of security his submission to the use of his land has inspired in the licensee, *Kay* v. *Penn. R. R. Co.* (1870) 65 Pa. St. 269. The true basis of his duty, however, see *Harriman* v. *Ry. Co.* (1887) 45 Ohio St. 11, is that his conduct has bound him to anticipate the presence of such a licensee, *Felton* v. *Aubrey* (1896) 74 Fed. 350, as distinguished from one whose license is given, expressly or by sufferance, on or for isolated occasions. See *Woolwine's Adm'r* v. *Ches. & O. Ry. Co.* (1892) 36 W. Va. 329. But except to suggest that in the latter case the licensor's liability may be predicated only upon actual knowledge of the licensee's presence, such a distinction between licensees seems valueless, unless, indeed, the licensor's conduct amount to an invitation. *Sweeney* v. *Old Colony R. R. Co.* (Mass. 1865) 10 Allen 368. Since, in the principal case, the defendant's servant had the requisite knowledge, the decision is unsound. See *Corrigan* v. *Sugar Refinery* (1868) 98 Mass. 577. Under this theory the further distinction which exempts the licensor from liability for his negligent omissions, *Nicholson* v. *Erie Ry. Co.* (1870) 41 N. Y. 525, is unjustifiable. *Davis* v. *Chi. & N. W. Ry. Co.* (1883) 58 Wis. 646.

NEGLIGENCE—STRANGER'S LIABILITY TO TRESPASSER.—An engine of the X company in which the plaintiff was riding, contrary to the rules of that company, was run into by a train of the defendant, while crossing the defendant's tracks, and the plaintiff was injured. *Held,* one judge dissenting, the defendant was liable since as to him the plaintiff was not a trespasser. *Grimshaw* v. *Lake Shore Ry. Co.* (1910) 125 N. Y. Supp. 626.

The rule restricting the liability of a land owner toward trespassers to injury resulting from wilful or wanton conduct, *Singleton* v. *Felton* (1900) 101 Fed. 526, is based, not upon any forfeiture of rights by the act of trespass, but upon the absence of any duty on the part of a land owner toward intruders. Pollock, Torts 173. The fact, therefore, that the plaintiff as regards a third party, is a trespasser, can have no legal effect upon the duties of the defendant, *Wilson* v. *American Bridge Co.* (N. Y. 1902) 74 App. Div. 596, and consequently affords no defence to injuries resulting from the latter's negligence. *Daltry* v. *Media Electric etc. Co.* (1904) 208 Pa. St. 403. If the crossing of the defendant's tracks by the plaintiff was a trespass, the defendant would clearly not be liable. This would be the case had the plaintiff been walking across the tracks when injured, *Keller* v. *Erie Ry. Co.* (1905) 183 N. Y. 67, but since the engine in which the plaintiff was riding was not trespassing, and the plaintiff was being conveyed over the X company's tracks by that company, which clearly had the right so to convey him, he cannot be said to have been a trespasser on the defendant's tracks. The defendant cannot take advantage of a rule forbidding persons to ride in the X company's engines, which the latter has formulated for its own convenience in the regulation of its business. The principal case would therefore seem to be correctly decided.

PARENT AND CHILD—CUSTODY OF ILLEGITIMATE CHILD.—On habeas corpus for the custody of an illegitimate child then in the custody of relatives who were reputable people and who had cared well for the child, it appeared that the petitioning mother had married and was living under circumstances proper for the rearing and maintenance of the child. *Held,* the mother, under the circumstances, was entitled to the control and custody. *Ex parte Jones* (N. C. 1910) 69 S. E. 217.

An illegitimate child at common law was *filius nullius* and its father was not subject to the rights and duties which attached to lawful paternity, *Simmons* v. *Bull* (1852) 21 Ala. 501, so that any paternal liability to maintain such offspring is wholly the creation of statute. *Moncrief* v. *Ely* (N. Y. 1838) 19 Wend. 405. Both the civil and common law, however, recognized the obligations of consanguinity existing between the mother and her natural child. 2 Kent, Com. 214. Even in the absence of statute the mother is bound to support the child until he becomes self-supporting, *Rosseau* v. *Rouss* (1904) 180 N. Y. 116, nor can she compel the putative father to aid in its support unless she employ the statutory bastardy proceedings. 2 Kent, Com. 215. By reason of this duty the mother is entitled to the custody of the child as against its putative father. *People* v. *Landt* (N. Y. 1807) 2 Johns. 375; *Roblina* v. *Armstrong* (N. Y. 1852) 15 Barb. 247. As against strangers or those with whom the child has been placed temporarily, the maternal right to determine the question of custody has been strongly upheld. *Queen* v. *Nash* (1883) 10 Q. B. D. 454. But the mother's right is not absolute, for, as in the case of legitimate children, 9 COLUMBIA LAW REVIEW 636, the welfare of the child is the cardinal consideration in determining the question of custody. *Queen* v. *Nash supra; Marshall* v. *Reams* (1893) 32 Fla. 499. In placing emphasis upon this element the principal case is in accord with the modern tendency.

PRINCIPAL AND SURETY—JUDGMENT AGAINST PRINCIPAL—ADMISSIBILITY IN ACTION AGAINST SURETY.—In an action against the sureties on a

bond conditioned for the payment of all costs which might be taxed against their principal in a certain suit, the plaintiff put in evidence the record of a judgment therein taxing costs against the principal. *Held,* the sureties were concluded by the judgment. *Calhoun* v. *Gray* (Mo. 1910) 131 S. W. 478. See Notes, p. 165.

PROCEDURE—RETURN OF SERVICE—CONCLUSIVENESS.—The plaintiff brought action on a note against the maker and endorsers. The sheriff returned that he executed the summons by leaving a copy at the maker's usual place of abode. The endorsers, who were personally served, pleaded in abatement that the sheriff's return as to the maker was false. *Held,* the return in the absence of fraud or collusion was conclusive. *Sutherland* v. *People's Bank* (Va. 1910) 69 S. E. 341.

The English rule that the return of the sheriff is conclusive, *Goubot* v. *De Crouy* (1883) 1 Cr. & M. 772, is followed by many courts in this country, *Talbot* v. *Southern Oil Co.* (1906) 60 W. Va. 423, except in cases of fraud or collusion; *Cavanaugh* v. *Smith* (1882) 84 Ind. 380; and consequently, a judgment founded on such return is not subject to direct attack. *Preston* v. *Kindrick* (1897) 94 Va. 760. The rule seems based on the objection, grounded in public policy, to opening up a judgment, *Preston* v. *Kindrick supra,* the aggrieved party having an adequate remedy against the sheriff. *Barr* v. *Satchwell* (1729) 2 Str. 813. On principle, however, it seems unsound. Since proper service of summons is a pre-requisite to jurisdiction, if the return of service is false there is no jurisdiction and any judgment founded thereon is void; *Ferguson* v. *Crawford* (1877) 70 N. Y. 253; and generally, jurisdictional facts may be inquired into though recited in a judgment, *Starbuck* v. *Murray* (N. Y. 1830) 5 Wend. 148, and *a fortiori,* before judgment is rendered. The existence of a remedy against the sheriff is therefore not sufficient to distinguish the case of a false return. A few jurisdictions accordingly hold that the return is merely presumptive evidence. *Butts* v. *Francis* (1822) 4 Conn. 424; see *Paul* v. *Malone* (1888) 87 Ala. 544. Other courts, recognizing that originally, when personal service was necessary and a declaration was not delivered until appearance, Com. Dig. *tit.* Pleader C I, II, a judgment without actual notice was almost impossible, and observing that the rule is more apt to cause hardship since the introduction of constructive service, have modified it by holding a sheriff's return conclusive only as to facts peculiarly within his knowledge; *Bond* v. *Wilson* (1871) 8 Kan. 228; and the modification seem an expedient one. The principal case, however, correctly applies the accepted doctrine.

RECEIVERS—SITUATION IN CONDUCTING BUSINESS.—A receiver shipped goods under a bill of lading providing for a lien for all previous freight charges due from the same shipper. *Held,* one judge dissenting, the carrier could not assert a lien for freight incurred by the company in the receiver's hands prior to his appointment. *Whinney* v. *Moss Steamship Co. Ltd.* L. R. [1910] 2 K. B. 813. See Notes, p. 167.

TAXATION—ILLEGAL BUSINESS—LICENSES.—The defendant was charged with selling intoxicating liquors without a license under a statute imposing a privilege tax on such occupation. The place of the sale was prohibition territory under the "four mile" law. *Held,* the law requiring a license and the prohibition law were consistent. *Diamond* v. *State* (Tenn. 1910) 131 S. W. 666.

The Tennessee constitution, Art. II, Sec. 28, authorizes the legislature to tax "privileges:" Defining a "privilege" as any business which without a license would be illegal, *French* v. *Baker* (Tenn. 1856) 4 Sneed 93, the courts have contrued this provision to mean that the legislature may declare any occupation to be a privilege and impose a privilege tax thereon. *Turnpike Cases* (1893) 92 Tenn. 369, 372; *State* v. *Schlier* (Tenn. 1871) 3 Heisk. 281. The so-called "license" given on payment thereof, however, does not necessarily legalize the business, but operates merely as a receipt for payment of the tax, *Blaufield* v. *State* (1899) 103 Tenn. 593, which is consequently not a license tax in the true sense. Cooley, Taxation 1137; *cf. License Tax Cases* (1866) 5 Wall. 462. A mere tax on a business does not authorize the business, see *Youngblood* v. *Sexton* (1875) 32 Mich. 406, 418, and hence may exist in conjunction with a law prohibiting the occupation, *State* v. *Doon* (Ga. 1811) Charlton 1, being supportable either as an added attempt to restrict and regulate in the exercise of the police power, see *People v. Murray* (1896) 149 N. Y. 367, or as a revenue measure. *Conwell* v. *Sears* (1901) 65 Oh. St. 49; see *Veazie Bank* v. *Fenno* (1867) 8 Wall. 533, 548. In this view of the tax involved in the principal case, therefore, the decision of the court is correct. A true license tax, indeed, is properly deemed inconsistent with a general or local prohibition law. Since no permission can issue to conduct the business in the prohibition territory, the tax therefor is obviously not demandable; and hence the license law is suspended *pro tanto, Butler* v. *State* (1889) 25 Fla. 347, the real offence being selling rather than selling without a license. *Patton* v. *State* (1888) 80 Ga. 714; *contra, Comw.* v. *Barbour* (1905) 121 Ky. 463; *State* v. *Goings* (1888) 101 N. C. 709. The construction adopted in the principal case, however, seems the correct one. Cooley, Taxation 1135.

WASTE—LANDLORD AND TENANT—INJUNCTION.—A tenant for a term of ten years cut a doorway through a party wall between the demised premises and an adjacent building. The landlord had refused permission and the work was done the night before the injunction issued. *Held,* a temporary injunction, restraining further waste and ordering a restoration of the wall to its former condition, should be affirmed. *Hamburger & Dreyling* v. *Settegast* (Tex. 1910) 131 S. W. 639.

Whether or not waste has been committed, especially in leasehold estates, is to-day primarily a question of intention, it being presumed that the lessor expects the tenant to leave the estate substantially as he found it. Ashburton, Equity 490. Hence diminishing the value of, increasing the burden upon, *Doe d. Grubb* v. *Burlington* (1833) 5 B. & Ad. 507, or materially altering the tenement is waste. 22 Vin. Abr. 439; *City of London* v. *Greyme* (1607) Cro. Jac. 181; but see *Melms* v. *Pabst Brewing Co.* (1899) 104 Wis. 7. And if at the time the act is injurious to the realty, it is no justification that the tenant intends to restore the premises to their former condition. *Agate* v. *Lowenbein* (1874) 57 N. Y. 604. Inasmuch as waste is an injury to the realty, equity takes jurisdiction almost as a matter of course. Langdell, Eq. Jur. 31. However it refuses to interfere in case of trivial waste, *Mollineux* v. *Powell* (1730) 3 P. Wms. 268 n. (F), or of ameliorating waste in a long term lease. *Doherty* v. *Allman* (1878) L. R. 3 App. Cas. 709. The latter doctrine has been explained on the ground that under the long term lease a substantial alteration of the

freehold is within the intention of the parties, the lessee as regards waste being treated virtually as owner. See *Klie* v. *Von Broock* (1897) 56 N. J. Eq. 18. In a short term lease, however, even in the absence of serious injury the court will restrain a material alteration to an extent beyond what is fairly implied from the terms of the lease, *Klie* v. *Von Broock supra,* even if the change is for the lessor's advantage. *Smyth* v. *Carter* (1852) 18 Beav. 78. While the court is slow to require specific reparation before a final hearing, *Gale* v. *Abbot* (1862) 8 Jur. [N. S.] 987, where the party has hastened to accomplish the injury before the court could act, a preliminary mandatory injunction is often issued, *Daniel* v. *Ferguson* L. R. [1891] 2 Ch. 27, as in the principal case.

WILLS—CONSTRUCTION—SURVIVORSHIP.—The testator bequeathed money in trust for A for life and at her death the principal "to be equally divided among her three children or the survivors or survivor of them at their majority." *Held,* the direction as to payment being independent of the gift to survivors, words of survivorship refer to the death of the life tenant; and a child attaining 21 and dying before A took nothing. *Hawke* v. *Ledge* (Del. 1910) 77 Atl. 1090. See Notes, p. 172.